



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

---

In the Matter of the Petition of the Town of  
Oshkosh to Discontinue a Public Right-of-Way to  
Lake Winnebago Located at the Terminal East End  
of the Highway Known as Sunnyview Road in the  
Town of Oshkosh, Winnebago County

---

Case No. IH-99-04

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

The Town of Oshkosh, c/o Gerald R. Frey, Chairperson, completed filing an application with the Department of Natural Resources for a permit pursuant to sec. 80.41, Stats., to discontinue a public right-of-way to Lake Winnebago, in Section 30, Township 19 North, Range 17 East, at the terminal east end of the highway known as Sunnyview Road in the Town of Oshkosh, Winnebago County, Wisconsin.

On November 2, 1998, the Department of Natural Resources issued a Notice of a Proposal to Abandon a Way to Water which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the abandonment approval without a hearing. The Department received timely objections to the abandonment approval request.

Pursuant to due notice hearing was held on May 17, 1999, at Oshkosh, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Town of Oshkosh, by

Attorney John A. St. Peter  
Edgerton, St. Peter, Petak, Massey & Bullon  
P. O. Box 1276  
Fond du Lac, WI 54936-1276

Rick Billington, Town Supervisor  
4420 Sherman Road  
Oshkosh, WI 54901

Gerald R. Frey, Town Chairman  
4804 Island View Drive  
Oshkosh, WI 54901

Department of Natural Resources, by

Attorney Joseph Renville  
P. O. Box 7921  
Madison, WI 53707-7921

City of Oshkosh, by

Attorney Warren P. Kraft  
Office of City Attorney  
P. O. Box 1130  
Oshkosh, WI 54902-1130

Richard Wollangk, City Manager  
City of Oshkosh  
P. O. Box 1130  
Oshkosh, WI 54902-1130

Otter St. Fishing Club, by

Bill McAloon  
6468 East Decoran  
Oshkosh, WI 54901

G. Philip Grundy  
1556 West County Road V  
Oshkosh, WI 54904

Professor LeRoy L. Zacher  
4470 Island View Drive  
Oshkosh, WI 54901

William Dunwiddie  
1130 North Westfield Street  
Oshkosh, WI 54902

Carol J. Kaufmann  
2677 Indian Point Road  
Oshkosh, WI 54901

Richard Purtell  
4504 Island View Drive  
Oshkosh, WI 54901

Walter Reid  
Sunny View Road  
Oshkosh, WI 54901

Mike Albright  
4490 Sherman Road  
Oshkosh, WI 54901

Robert Albright  
88 Steamboat Court  
Winneconne, WI 54986

Fred Baker  
3071 Shadow Lane  
Oshkosh, WI 54901

#### FINDINGS OF FACT

1. The Town of Oshkosh, c/o Gerald R. Frey, Chairperson, Oshkosh, Wisconsin, completed filing an application with the Department for approval pursuant to sec. 80.41, Stats., to discontinue a public right-of-way access to Lake Winnebago in the Town of Oshkosh, Winnebago County. The Department and the applicant have fulfilled all procedural requirements of sec. 80.41, Stats.
2. The applicant owns real property located in Township 19 North, Range 17 East, Winnebago County. The above-described property abuts Lake Winnebago which is navigable in fact at the project site. The site is at the terminal east end of Sunnyview Road.
3. On August 27, 1998, the applicant adopted an Order abandoning the above-described public access which is a former fire lane access to Lake Winnebago. (Ex. 2) It is likely that, in years past, the access was used to obtain water for local firefighters. The area now relies on a City of Oshkosh fire hydrant for this purpose. The public access point off Sunnyview Road is small and undeveloped. The road simply ends at Lake Winnebago. Sunnyview Road is in a pleasant residential neighborhood.
4. The purpose of the abandonment is to prevent public loitering, littering and other public nuisances occurring at the site. The neighboring riparians adjacent to the right-of-way are Richard and Sherry Purtell and Mr. Frank Haynes. Mr. Purtell (Purtell) testified persuasively that there are consistent problems relating to littering, alcohol and marijuana use at the site. (See: Exs. 12-16) Purtell testified that in one particularly disturbing incident, his daughter discovered

and began to play with a used condom found near the site. Further, Purtell testified that he felt intimidated by combative users of the site when he asked them to leave his property.

5. The Sunnyview Road site is one of several in residential areas of the Town of Oshkosh. All parties agreed that it was one of the poorest lake access sites, due in part to the steep grade down to the lake from the road's endpoint. Many witnesses testified that it would be difficult or impossible to navigate a standard automobile and trailer to put in a motor boat at the site. However, several witnesses stated that 4-wheel drive vehicles had accomplished the same task. The Town presented the expert testimony of William Elman, who made a review of public access sites near the site the Town wants to abandon. There is no serious dispute that the site in question is one of the poorest in quality of the numerous fire lane access points in the Town of Oshkosh and environs. (Ex. 17)

6. While the site is not a highly-used or improved public access, the fire lane does provide some significant public purposes. The principal uses of the site have been for viewing the lake, for ingress and egress of snowmobilers to and from the lake, and as an emergency egress access off the lake, especially during winter months. The site provides an access point for snowmobilers making use of the lake, and is a welcome egress point when ice cracks limit other places to safely get off the lake. (Albright) Further, during sturgeon season in the winter, the site also provides a safety value for fishermen facing ice cracks and needing emergency egress. (McAloon) Further, Mr. Walter Reid testified that he is confined to a wheelchair and lives in the area around the site. Reid noted that he was able to negotiate his wheelchair to enjoy a view of the natural beauty of the lake from the public access off Sunnyview Road. None of the other access sites, the nearest of which is over a mile away, is close enough for him to reach in the same manner. There is no question that the instant access contributes in a positive way to the "quality" of access for residents who wish to view the lake. The site is regularly used by members of the public in both summer and winter. Ms. Van Hildenvan, while testifying in favor of abandonment, candidly admitted that on most winter weekends snowmobilers or ice fishermen made use of the site, and that members of the public drove down the access to view the public waters of the lake on most summer weekends.

Taken as a whole, a clear preponderance of the credible evidence supports a finding that the public access contributes to the quality and quantity of public access to Lake Winnebago.

7. The DNR presented several witnesses who opined that the site contributed to both the "quantity" and "quality" of public access to Lake Winnebago. (Koeken; Kamke) The DNR has the legal authority to approve Town requests to abandon public sites which provide access to navigable waters of the State of Wisconsin. (Sec. 80.41, Stats.) The DNR has interpreted the statute to adopt a policy which "discourages the loss of access to public waters." (Ex. 35) However, if suitable alternative access is available, the DNR has on occasion approved Town abandonment requests. (Id., Ex. 36) In evaluating Town abandonment requests, the DNR considers whether there is an alternative public access available within one-half (1/2) mile of the site proposed to be abandoned. (Koeken) This rule of thumb is guidance and does not have the force and effect of law. (Id.) In the instant case, there was no alternative public access available within 1.3 miles of the Sunnyview Road site. (Ex. 17) Further, the Town does not intend to replace this access with another new public access as contemplated by the statute.

Taken as a whole, the Department's determination that the Sunnyview Road site contributed to both the quality and quantity of public access to Lake Winnebago was demonstrated by a preponderance of the credible evidence.

8. There have been numerous problems at the site, and there is a rational basis for the Town to have concluded that abandonment was in its interest. However, in considering the DNR approval of the abandonment it is necessary to balance the public interest in gaining access to the public waters with the Town's interest in abandoning the access. It is also necessary to look beyond the Town's conclusions that abandonment of the public access is necessary to address its concerns.

G. Philip Grundy (Grundy) was Town Chairman of the Town of Oshkosh for 16 years. Grundy testified that there were numerous other options, short of the drastic and final step of abandoning the public access, to address the Town's legitimate concerns. Grundy testified that a metal skirting, such as that employed at the Leach Road site (Ex. 18, #15) could restrict access by cars attempting to unlawfully park in the access lane. Similarly, placement of a garbage can would improve problems with litter. (Grundy) Further, the existing grade could be modified to better serve boaters.

With respect to problems with illicit alcohol and other drug use at the site, it is interesting to note that the County Sheriff's office has never been contacted to address these concerns. It seems likely that such police contact would contribute to a reduction in public nuisance activities at the site. Further, it is not at all clear from the record that trespassing and illicit activities will not continue if the site is abandoned.

9. The Town argues that sec. NR 1.91, Wis. Admin. Code relating to public boating access standards governs the instant access site, and that the site does not meet the parking requirements of sec. NR 1.91(2)(b), Wis. Admin. Code, and does not meet the definition of an "access site." However, the Department was persuasive that sec. NR 1.92, relating to "abandonment of access," is broader in scope than the "boating access" addressed in sec. 1.91, Wis. Admin. Code. Further, on its face, sec. NR 1.91(2)(g), Wis. Admin. Code defines "public access" as follows:

" 'Public access,' for purposes of s. NR 1.92, means any site providing motor vehicle access to ice-bound waters, public boating access or carry-in access."

A clear preponderance of the evidence demonstrated that the site met the above definition of a "public access" for purposes of sec. 80.41, Stats., and sec. NR 1.92, Wis. Admin. Code.

10. The City of Oshkosh appeared at hearing to oppose the abandonment request. Its principal concern, shared by Mr. Zacker, is that loss of the fire lane access may have an impact upon future development in the area due to a reduction in the ability to drain water through the access point. There is currently a culvert at the site. However, the Town was persuasive that the

drainage easement it has secured from the Purtells and Mr. Haynes would assure the right to enlarge drainage infrastructure as needed in the future.

11. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary Orders in review of requests to abandon public right-of-way access to navigable waterways pursuant to sec. 80.41, Stats., and sec. 227.43(1)(b), Stats.

2. No resolution, ordinance, order or similar action of any town board or county board or committee thereof discontinuing any highway, street, alley or right-of-way that provides public access to any navigable lake or stream shall be effective until such resolution, ordinance, order or similar action is approved by the Department of Natural Resources. Sec. 80.41, Stats.

3. The Division may grant the petition to abandon or discontinue the public access only if: a) any sites or part thereof proposed to be abandoned or discontinued is replaced prior to granting the petition; or b) the Department finds that the access proposed to be abandoned does not contribute to the quality or quantity of public access on the body of water. Sec. NR 1.92(2)(b), Wis. Admin. Code. The public right-of-way contributes to both the quality and quantity of public access to Lake Winnebago.

### ORDER

WHEREFORE IT IS HEREBY ORDERED, that Department's decision to DENY the abandonment of the public right-of-way is AFFIRMED, and that the petition for review be DISMISSED.

Dated at Madison, Wisconsin on June 7, 1999.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705-5400  
Telephone: (608) 266-7709  
FAX: (608) 267-2744

By \_\_\_\_\_  
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE